APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA, MIAMI DIVISION

NO. 72-213-Civ-CA

BETH W. CORPORATION
a Florida corporation,

Plaintiff,

v

UNITED STATES OF AMERICA

Defendant.

MEMORANDUM OPINION

This income tax refund suit is before the Court following a jury trial of certain issues. At the time of the pretrial conference, ruling on defendant's motion for partial summary judgment was reserved by the Court, pending further inquiry as to whether any factual issues remained on the question of the tax implications of the 1957 property settlement agreement.

Plaintiff and defendant have now agreed that the question posed, whether or not the division of the property under the 1957 property settlement agreement was a nontaxable division of property between co-owners under *United States v. Davis*, 370 U.S. 65 (1962), should be

submitted to the court for decision. This submission is based on the agreement of the parties that this mixed question of law and fact is approximately 97% law and 3% fact. After consideration of all the evidence adduced at trial, it is clear that the defendant is entitled to judgment as a matter of law.

The relevant facts of this case may be recited briefly as a foundation for discussion of the legal question posed. The plaintiff, Beth W. Corporation, which was incorporated in 1962, is owned by Jewell Waldrep, its president. Jewell and Wiley Waldrep were married on January 24, 1927. On December 20, 1957, pursuant to a property settlement agreement entered into on December 18, 1957 during their divorce proceedings, each of the Waldreps conveyed to the other certain real properties owned by them. Later, on May 17, 1963, Jewell Waldrep transferred to the plaintiff corporation, in exchange for all of the corporation's common stock, 796.27 acres of the land she had received from her husband in the property settlement. On August 31, 1964, the plaintiff sold 40 of these acres for $113,100. At issue here is the amount of the income tax liability resulting from said sale. It is stipulated that plaintiff's May 17, 1963 basis in the land it acquired from Jewell Waldrep was the same as her basis in the land at the time of the transfer to the plaintiff.

This Court must determine the basis of that land in the hands of Jewell Waldrep at the time she received it pursuant to the property settlement. The plaintiff argues that her basis was the fair market value of the land on December 18, 1957, the date of the property settlement agreement. The government contends that the basis was the original cost of the land to Jewell and Wiley Waldrep.

Resolution of this issue depends on whether the distribution of this realty pursuant to the property settlement agreement was, as plaintiff contends, a taxable event or merely a nontaxable division of property between co-owners, as defendant asserts. If the conveyance was a taxable event, the husband should have been taxed on the gain and the wife's basis in the land would become its fair market value at the time of transfer. If, however, the distribution was a non-taxable division of property, the wife took the property with the same basis it had when owned by both husband and wife. The gain created by the appreciation in value of the land would then be subject to taxation upon the occurrence of a subsequent taxable event.

It is agreed that the relevant acreage was held by Jewell and Wiley Waldrep as tenants by the entireties. It is also agreed that the issue posed to the Court for decision requires a comparison between the facts of this case and the facts and rules laid down in *United States v. Davis, supra*, and its progeny.

In *Davis*, the taxpayer, pursuant to a property settlement and separation agreement, transferred to his wife certain personal property. This property was owned by the taxpayer under state law subject to his wife's statutory interest, akin to dower, in the property. Attempting to tax the appreciation in the property value as capital gain realized by the taxpayer upon the transfer to his wife, the Commissioner found a taxable "sale or other disposition" of the property.

Before the Supreme Court the taxpayer argued, as does the government in the case *sub judice*, that the trans-

fer was a nontaxable division of property between two co-owners. This was rejected by the unanimous Court:

> The taxpayer's analogy, however, stumbles on its own premise, for the inchoate rights granted a wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has not interest — passive or active — over the management or disposition of her husband's personal property. Her rights are not descendable and she must survive him to share in his intestate estate. Upon dissolution of the marriage she shares in the property only to such extent as the court deems 'reasonable.'

United States v. Davis, 370 U.S. 65, 70 (1962). As the Court viewed the state law, "Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof." *Id.*

In Florida, however, the wife's interest in property held by the entireties is considerably greater than a mere liability imposed on the interest of the husband. It is readily apparent that such an interest attains "the dignity of co-ownership," as that phrase is used in *Davis*. The essence of the entireties concept is that each spouse is seised of the whole and not of a share, moiety, or divisible part. *See, e.g., Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925), *Naurison v. Naurison*, 132 So.2d 623 (Fla. App. 1961). Property held as a tenancy by the entireties cannot be partitioned during the marriage of the tenants. *Naurison, supra.* It is not subject to execution to satisfy the debt of either spouse. *France v. Hart*, 170 So.2d 52 (Fla. App. 1964). One spouse alone cannot, without the joinder

of the other, convey, sell, lease, or encumber any part of the estate. *See, e.g., Montgomery v. Gibson*, 69 So.2d 305 (Fla. 1954). Upon the death of one spouse, the estate by the entireties is vested by operation of law in the surviving spouse. Upon divorce, the tenants become tenants in common. F.S.A. §689.15. Surely these features of the estate by the entireties indicate that a wife holding such an interest is, in actuality as well as in theory, a co-owner of the subject property.

Plaintiff, perhaps sensing the weakness of the attempted analogy between the property interest discussed in *Davis* and the Florida estate by the entireties involved here, relies upon certain post-*Davis* cases. It argues that these cases, most notably *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir.), *cert. denied*, 379 U.S. 836 (1964), and *Hornback v. United States*, 298 F.Supp. 977 (W.D. Mo. 1969), are more similar to the fact situation *sub judice*.

Hornback, however, supports the defendant's characterization of the property settlement agreement. In that case the taxpayer-wife conveyed certain jointly owned property to her husband as part of a property settlement during their divorce. In return the husband gave a note in payment for her surrender of her interest in the real estate. As the district court viewed the transaction:

> the property settlement here in question was a taxable transaction. The parties did not simply divide their jointly owned property. Rather Mrs. Hornback liquidated her interest in the joint property by sale. She sold her interest in the real estate to Mr. Hornback and he paid for it by his

> note which by the supplemental agreement was payable over a period of years.

Hornback v. United States, supra, 298 F.Supp. at 983. The illustrations in *Hornback, Id.* at 981-82, describe the case *sub judice:* "If husband and wife literally divide or partition the property . . . so that each just gets his own proper part, there is no taxable transaction involved."

Such an equal division was the essence of the Waldreps' settlement. Wiley Waldrep testified that the basis for the apportionment of property between him and his wife in the property settlement agreement was an attempt to arrive at a 50%-50% division of the jointly owned property, based upon current market values. This valuation is reflected in item 5(7) of the pretrial stipulation. Thus the Waldrep transaction resembles a non-taxable division of property between co-owners. *Pulliam v. Commissioner, supra*, involving a wife's interest in Colorado land owned solely by her husband and very similar to the Delaware interest described in *Davis*, does not mandate a different conclusion.

Accordingly, it is the opinion of the Court that no taxable transaction took place in December of 1957 when Wiley and Jewell Waldrep conveyed certain property to one another. Therefore the basis of the land received by Jewell Waldrep, and ultimately by the plaintiff, was its original cost basis. This basis, the parties have stipulated, was between $11.34 and $15.65 per acre for the 40 acres sold by the plaintiff. The Commissioner correctly assessed a deficiency against plaintiff for capital gains resulting from the sale of the 40 acres. Judgment must therefore be entered for the defendant.

As an alternative basis for deeming the 1957 transaction a non-taxable event, the defendant contended that the property settlement agreement was a non-taxable division of partnership property upon the dissolution of a partnership between Wiley and Jewell Waldrep. Plaintiff contended that no partnership existed. The excellent pretrial stipulation prepared by able counsel made it possible to submit a single question to the jury on this issue. The jury answered special interrogatory Number (1), "Was a partnership formed between Wiley Waldrep and Jewell E. Weldrep during their marriage?" in the negative.

The jury's finding is, of course, not inconsistent with the Court's ruling on the *Davis* issue. Indeed, the jury was instructed, at plaintiff's request, that "the mere fact that a husband and wife hold title to such lands as tenants by the entireties is not sufficient to establish a partnership between the husband and the wife." The jury finding does mean, however, that the judgment for the defendant rests solely on the Court's ruling that the December, 1957 conveyances constituted a non-taxable division of property between co-owners.

This memorandum contains the Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.C.P. A separate judgment will be entered in this cause.

ENTERED at Miami, Florida this 20th day of November, 1972.

/s/ C. Clyde Atkins

United States District Judge

* * *

APPENDIX B

FINAL JUDGMENT

THIS action came on for trial before the Court, and the issues having been duly tried, and the Court having previously entered its findings of fact and conclusions of law in memorandum form, it is ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant United States of America recover of the plaintiff Beth W Corporation its costs of action, to be taxed by the Clerk of the Court.

Entered at Miami, Florida this 20th day of November, 1972.

/s/ C. Clyde Atkins

United States District Judge

* * *

APPENDIX C

ORDER ON POST TRIAL MOTIONS

THIS CAUSE came before the Court on the government's motion to set aside the jury verdict on the partnership issue and plaintiff's motion to amend and supplement the findings of fact and conclusions of law. I have carefully considered the record and the memoranda submitted in support of said motions.

* * *

For the reasons detailed above, the defendant's motion to set aside the jury verdict is denied.

B. Plaintiff's motion to amend and supplement findings of fact, conclusions of law and amend final judgment seeks to expand the Court's findings into areas that are either unsupported by credible evidence or of only tangential relevance. I will, however, supplement the previously entered findings of fact, contained in my November 20, 1972 memorandum opinion by the addition of the following paragraph, which falls, in my opinion, into the category of tangentially relevant matter:

The property in dispute was purchased by Wiley Waldrep, either in his name or, in other instances, jointly with his wife, Jewell Waldrep. The latter did not always know of the purchases. She did not know, until institution of the divorce proceeding, whether the property had been acquired in the name of her husband or in their joint names. Both Wiley and Jewell Waldrep contributed to the initial success of the dairy business. Her contribution was

limited and at times curtailed, by her illness. The evidence points strongly to the conclusion that monies from the dairy business were used to purchase the property in question.

IT IS THEREFORE ORDERED AND ADJUDGED that, with the exception of the addition noted above, plaintiff's motion to amend and supplement is denied.

ENTERED at Miami, Florida this 26th day of December, 1972.

/s/ C. Clyde Atkins

United States District Judge

* * *

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1746
Summary Calendar*

BETH W. CORPORATION,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(August 15, 1973)

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED.[1] See Local Rule 21.[2]

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*Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]*Beth W. Corp. v. United States*, 350 F.Supp. 1190 (S.D. Fla. 1972).

[2]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir., 1970, 430 F.2d 966.

APPENDIX E

COMPLAINT

Plaintiff, BETH W. CORPORATION sues the Defendant UNITED STATES OF AMERICA, and . . . alleges that:

* * *

4. During the marriage of the WALDREPS, WILEY WALDREP was engaged in the dairy farming business and acquired over approximately 30 years a substantial amount of land in Broward County, Florida. These lands were acquired with the funds of WILEY WALDREP and all of said lands or some of these lands were used by him in his dairy farming business.

5. Incident to the aforementioned divorce proceeding, JEWELL WALDREP and WILEY WALDREP entered into a Property Settlement Agreement on December 18, 1957, which was approved by the said Circuit Court of Broward County, Florida and made a part of its Final Decree in said proceedings . . . , marked Plaintiff's Exhibit A.

6. Under said . . . Agreement, WILEY WALDREP agreed to transfer to JEWELL WALDREP certain real and personal properties . . . including approximately 820 acres of . . . land . . . which JEWELL WALDREP agreed to accept as and for and in lieu of any support money, maintenance, alimony, right of dower, and any other rights, claims or demands she then or might thereafter

have against WILEY WALDREP. Said lands were in fact conveyed to JEWELL WALDREP by WILEY WALDREP (on) . . . December 20, 1957.

7. JEWELL WALDREP'S basis for said 820 acres of land upon her acquisition of the same from WILEY WALDREP as alleged above was its fair market value on December 20, 1957.

* * *

16. On September 12, 1969, the District Director made a deficiency assessment against Plaintiff for its fiscal year ending July 31, 1965 of $2,969.33 . . . based in part upon the District Director's determinations:

a. that the long term capital gain on the above sale transaction was $112,700 based upon the determination that Plaintiff's 40 acres had a cost basis of $10.00 per acre or a total of $400.00 instead of the claimed basis of $200,000, or

* * *

17. Plaintiff alleges that these determinations described in paragraph (16) were improper and that the additional income tax and interest was erroneously and illegally assessed and collected.

* * *

APPENDIX F

PROPERTY SETTLEMENT AGREEMENT

THIS AGREEMENT, made and entered into this 18 day of December, A.D. 1957, by and between JEWELL WALDREP . . . and WILEY WALDREP . . .

* * *

NOW, THEREFORE, in consideration of the mutual promises, covenants and of the premises, the parties hereto mutually agree as follows:

* * *

(3) That the Wife is to receive . . . the following:

(a) 1955 Cadillac.

(b) The . . . three-bedroom home located at 2816 N. E. 26th Place, Fort Lauderdale, Florida, . . .

* * *

Together with all the furniture, furnishings and personal property.

Subject to the . . . existing First Mortgage . . . of approximately $16,600.00, ...

(c) United States Savings Bonds Series E (all matured) [$3,000.00].

* * *

(d) One-half of the cash surrender value of the following life insurance policies . . .

(e) The sum of $3,000.00 in cash to equalize the holdings of stock in the Citizens' Bank at West Hollywood, and 3.04705 shares of stock of Store Equipment and Finance Company, which last named stock shall hereafter be the sole property of the Husband; and each party will retain the Bank stock now issued in their respective names.

(f) An undivided one-half of all the cash in the savings account of both parties . . . .

(g) One-half of all of the capital stock of Home Milk Producers Association . . . .

(h) The real estate and improvements known as the 7th Avenue property . . . .

(i) An undivided one-half interest in . . . . (the $17,000 Detjen note).

(j) All of the vacant land located in Sections 5 and 9 . . . consisting of 820 acres, ...

(k) Life insurance policy issued by . . . on the life of the Wife of which the Husband is the beneficiary.

(l) All clothing, personal effects, jewelry and personal property.

(4) That the Wife covenants and agrees that she is accepting the property as set forth above as and for and

in lieu of any support money, maintenance, alimony, right of dower and any and other rights, claims or demands of any nature or character whatsoever, past, present or future, which she now has or hereafter can or may have against the Husband and/or his properties or estate and the same is for a full, complete and final settlement.

(5) The Wife does absolutely and without reservations or restrictions of any kind, waive any and all claims for alimony, support money or maintenance, except as set forth in this Agreement, either now or in the future.

* * *

(7) The Husband is to receive as and for his absolute property the following:

(a) 1957 Chevrolet Sedan.

(b) The following life insurance policies . . . .

(c) 3.04705 shares of stock — Store Equipment and Finance Company.

(d) All clothing, personal effects, jewelry and personal property.

(e) An undivided one-half of all of the cash in the savings account of both parties . . . .

(f) One-half of all of the capital stock of Home Milk Producers Association . . . .

(g) An undivided one-half interest in . . . (the Detjen $17,000 note).

(h) All the cattle, dairy equipment and dairy buildings located in Broward County, Florida, known as Waldrep Dairy.

(i) All of the vacant real estate comprising Sections 3, 4 and 10 . . . .

(8) The Husband does hereby agree to be . . . responsible for the payment and discharge of the existing First Mortgage . . . of approximately $16,600.00 . . . on the residence located at 2816 N.E. 26th Place, Fort Lauderdale, ...

* * *

12. The Husband agrees to pay and discharge all existing joint obligations of the parties hereto, and particularly the $75,000 note due the Dania Bank, Dania, Florida.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and years first above written.

* * *

APPENDIX G

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1954

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) COMPUTATION OF GAIN OR LOSS.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) AMOUNT REALIZED.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized —

* * *

(c) RECOGNITION OF GAIN OR LOSS.—In the case of a sale or exchange of property, the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

* * *

SEC. 1002. RECOGNITION OF GAIN OR LOSS.

Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.